IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8509 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

VICHARTI & VIMUKT JATI MAHASANGH (GUJARAT)

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 8509 of 2002
MRS KETTY A MEHTA for Petitioner No. 1-5
Ms MANISHA LAVKUMAR, AGP for Respondent No. 1-4
RULE SERVED BY DS for Respondent No. 5

CORAM : MR.JUSTICE M.S.SHAH

Date of decision: 11/12/2002

CAV JUDGEMENT

This petition is filed by Vicharti & Vimukt Jati Mahasangh (Gujarat), an Association formed by the members of Nomadic Tribes/Denotified Tribes (hereinafter referred to as "NT/DNT") to look after the welfare of members of the said Tribes, especially for looking after the

admissions of their wards in institutions of higher education like medical and engineering colleges and by four students belonging to NT/DNT. In this petition under Article 226 of the Constitution, the petitioners have prayed for a writ to direct the respondent authorities of the State Government and the Chairman, Admission Committee for Engineering and Medical Colleges to show the names of petitioner Nos. 2 to 5 and other similarly situated students of NT/DNT category in the list of students for admissions to the medical colleges in a separate list for the reserved category of NT/DNT and also in a separate list of SEBC and to allow the said petitioners to fill in separate forms, one for the NT/DNT, which they have already filled in and the second for SEBC category (if they are entitled in the said category) and to follow the said procedure before finalizing the admissions in the medical colleges in the State of Gujarat. Similar prayer is made in respect of admissions to be given in the engineering colleges in the State.

2. At the hearing, the submissions were confined to admissions to medical colleges as the petitioners had no grievance regarding the procedure followed for giving admissions to engineering colleges. This year admissions to 1st MBBS/1st BDS courses and 1st Year Physiotherapy Course are governed by the Rules called "1st MBBS/1st BDS/1st B. Physiotherapy Courses at the Government Medical Dental Physiotherapy Colleges and Self Financing Institutes for these courses in the Gujarat State, 2002-2003" published as an accompaniment to the Government of Gujarat, Health & Family Welfare Department Resolution dated 18.5.2002. The following Rules contain the relevant provisions for reservation of seats for candidates belonging to different categories :-

"2. Seven percent, fifteen percent and twenty seven percent of the total seats shall be reserved for the candidates belonging to SC, ST (including Garudi) and SEBC respectively, ... This reservation shall be for the candidates belonging to SC/ST (including Garudi)/SEBC recognized as such in the State of Gujarat and not to those who have migrated from other States.

Provided that 49% reserved seats as mentioned above shall be calculated out of the left over seats after deducting Central Government Nominee seats, N.R.I. seats and 15%

seats for the candidates coming from All India Entrance Examination provided in Rule 2.7 ... ...

2.1 1/5th of the seats reserved for the candidates belonging to Scheduled Castes, Scheduled Tribes (including Garudi) shall be earmarked for girl students of these communities and categories. If any seats so reserved remain vacant they will be given to boy students of the said communities and categories respectively.

2.4 The seats earmarked for admission of the particular category students under reserved seats for the candidates from the category belonging to SC/ST (including Garudi) SEBC (excluding Creamy Layers) etc. will be allotted for admissions of the students of the respective categories. For this purpose merit list will be prepared categorywise and admissions for each category will be regulated accordingly.

2.5 In case it is found in any particular year that the number of students belonging to respective communities and or categories mentioned above are not available for the reserved seats for such communities/categories, the vacant seats from that reservation shall be treated as unreserved seats and filled up from amongst the students from the open merit list of the respective Board/Council.

2.5(A) While admitting in the 1st MBBS/1st BDS/1st B. Physiotherapy courses in the Medical/Dental/Physiotherapy Colleges of the State Government and self financing institutes for these courses, the candidates belonging to the SC/ST (including Garudi)/SEBC for whom reservation is made and who come on open merit will be counted against non-reserved seats. The reservation percentage will be applied in addition to those who come on merit.

2.6 The candidates seeking admission under rule 2 will have to produce the caste certificate from competent authority as per rule 2.2 and 2.3 in prescribed proforma alongwith the application form. The candidate will not be allowed to change the caste or category thereafter.

Rule 2.7 provides for reservation of 15% seats

for candidates of all India Entrance Examination. Rule 2.8 provides for reservation of 3% of available seats in each category (SC/ST/SEBC/Open) in Government Medical/Dental/Physiotherapy colleges in locomotor disabled candidates of the respective categories. Rule 4 of the said Rules lays down the criteria of eligibility for admission in the following terms :-

"4. The minimum requirement of marks at the qualifying examination for admission to the first MBBS/BDS/B. Physio Course shall shall be as under :-

4.1 The aggregate marks obtained at the external evaluation in Science subjects (Physics, Chemistry, Biology and Mathematics) in theory papers only shall be as under :-

	Percentage
4.1 (a) For Scheduled Caste candidates	40
4.1 (b) For Schedules Tribes (including Garudi) candidates	40
4.1 (c) For Socially & Educationally Backward Class candidates (Excluding Creamy Layer)	50
4.1 (d) For all other candidates except where specific contrary provision has been made in the Rules"	55

3. The controversy is as to what is to happen when adequate number of eligible Scheduled Tribe candidates are not available for filling in the 15% seats reserved for Scheduled Tribes. According to the petitioners, such vacant seats from ST quota must be made available to the candidates belonging to NT/DNT. On the other hand, according to the State Government in the Health & Family Welfare Department, which is the administrative department regulating admissions to medical/dental and physiotherapy colleges, such vacant seats are to be made available to the open merit students. The NT/DNTs are included in one of the three categories - Scheduled Castes (2 Tribes), Scheduled Tribes (6 Tribes) or Socially & Educationally Backward Classes - SEBC (32 Tribes). Since all the 40 tribes which were earlier notified as NT/DNT are included in one or the other reserved category, the Admission Rules do not provide for

separate reservation for the NT/DNT.

4. Before proceeding further, it will be necessary to set out a brief history of the reservations for particular communities in the matters of admissions to medical colleges as set out in the reply affidavit filed on behalf of the State Government.

4.1 By virtue of Government Resolution dated 30.3.1963, 40 NT/DNT tribes were classified. Prior to the bifurcation of the erstwhile State of Bombay, these NT/DNT were classified as such in the erstwhile State of Bombay. However, these tribes were not classified in the category of NT/DNT in the State of Kutch and Saurashtra. After the bifurcation of the erstwhile State of Bombay by virtue of the aforesaid Resolution, certain tribes were classified as NT/DNT in the entire State of Gujarat. Over a period of time, all these 40 tribes came to be accommodated in the three reserved categories prevalent in the State, i.e. SC/ST/SEBC. Government Resolution dated 1.4.1978 absorbs various tribes classified as NT/DNT into the SEBC category. However, as on date all the 40 tribes have been absorbed into three reserved categories, the details of which are as under :-

1. 32 tribes of the NT/DNT categories have been absorbed in the SEBC category.

2. 2 tribes of the NT/DNT categories have been absorbed in the SC category.

3. 6 tribes of the NT/DNT categories have been absorbed in the ST category, including the Garudi tribe.

4.2 Vide communication dated 13.8.1990 Anusuchit Jati Adivasi Yuvak Mandal (Gujarat State) made a representation to the "Tribal Development Department pointing out that the benefits conferred on the ST category is to be given to the said category only, but substantial benefits are being taken by the NT/DNT tribes and ST candidates are being deprived of the reservation benefits. The Tribal Development Department vide communication bearing No. isc-2490-M-108-Ch dated 12.9.1994 made a representation to the Education Department opining that considering the fact that the reservation benefits are already being granted to the NT/DNT in the respective three reserved categories i.e. SC/ST/SEBC, dual reservation benefits ought not to be granted to the NT/DNT as the same would amount to

additional reservation benefits in favour of the NT/DNT as against the other reserved categories i.e. SC/ST/SEBC. Pursuant to the said communication, the Education Department accepted the opinion and recommendation of the Tribal Development Department and vide letter dated 4.10.1994 conveyed their concurrence with the view expressed by the Tribal Development Department in the earlier communication dated 12.9.1994.

In the light of the aforesaid facts, Government Resolution dated 16.6.1995 (Annexure "C" to the reply affidavit) came to be issued by the Social Welfare and Tribal Development Department restricting the dual reservation benefits conferred on the NT/DNT candidates on the ground that as they are already enjoying the reservation benefits of the respective categories, dual reservation benefits shall not be conferred on the NT/DNT.

4.4 1995-96

However, as the admission process was under way and the academic year had already commenced, considering the practical hardships which would enure by virtue of the earlier Government Resolution dated 16.6.1995 for the academic year 1995-96 alone, operation of the said Government Resolution dated 16.6.1995 restricting the dual reservation benefits was suspended. It was a temporary interim short term measure taken to avoid undue hardships which would enure for the students as well as the administration in implementing the earlier Government Resolution dated 16.6.1995, which was published after the academic year had commenced.

4.5 1996-96 to 2000-01

Thereafter the State Government, Social Welfare and Tribal Development department (now known as Social Justice and Empowerment Department) issued the following Government resolutions continuing the aforesaid double benefit in favour of NT/DNT for the respective years which were acquiesced into by the Health and Family Welfare Department :-

G.R. Dated	For the academic year
28.08.1996	1996-97
30.05.1997	1997-98

29.05.1998 1998-99
15.03.1999 1999-2000
24.04.2000 2000-01

The Court's attention is invited to the fact that the Rules for admission to 1st MBBS/1st BDS/1st B. Physiotherapy Courses at the Government Medial/Dental/Physiotherapy Colleges and Self Financing Institutes for the said courses in the Gujarat State are being framed and published for each particular academic year. For the year 1999-2000, the relevant Rule 2.5 read as under :-

"2.5 In case it is found in any particular year that the number of students belonging to respective communities or categories mentioned above are not available for the reserved seats for such communities/categories the vacant seats from that reservation shall be treated as unreserved seats and filled up from amongst the students fro the open merit list for the purposes of these admission provided that if the reserved seats are distributed on pro-rata basis between Gujarat Board and Central Board/Council and if sufficient number of students are not available for the reserved seats distributed to the Central Board/Council such vacant seats shall be filled up by the available candidate from amongst the students on merit list prepared for the Gujarat Board category wise and vice versa.

Provided that as per the Tribal Development Department G.R. No. MIS-1098-CM-9-CH dated 15.3.99, the seats reserved for S.T. (including Garudi) candidates shall be filled up first from amongst the candidates of the S.T. (including Garudi) category only. However, in the events of non availability of the requisite No. of such S.T. (including Garudi) candidates from this category consequently vacant seats shall be filled in by the available eligible candidates from NT/DNT category for the year 1999-2000."

Thus the policy contained in the Government Resolution dated 15.3.1999 issued by the Tribal Welfare Department was accepted by the Health Department by incorporating the same in the Rules for admissions to medical colleges for 1999-2000.

Similarly for the year 2000-2001, the relevant Rule read as under :-

"2.5 In case it is found in any particular year that the number of students belonging to respective communities and or categories mentioned above are not available for the reserved seats for such communities/categories the vacant seats from that reservation shall be treated as unreserved seats and filled up from amongst the students from the open merit list for the purposes of these admissions provided that if the reserved seats are distributed on pro-rata basis between Gujarat Board and Central Board/Council and if sufficient number of students are not available for the reserved seats distributed to the Central Board/Council such vacant seats shall be filled up by the available candidate from amongst the students on merit list prepared for the Gujarat Board category wise and viceversa.

Provided that as per Tribal Department G.R. No. MIS-1098-CM-9-CH dated 24.4.2000, the seats reserved for S.T. (including Garudi) candidates shall be filled up first from amongst the candidates of the S.T. (including Garudi) category only. However, in the events of non availability of the requisite No. of such S.T. (including Garudi) candidates from this category consequently vacant seats shall be filled in by the available eligible candidates from NT/DNT category for the year 2000-2001."

4.5 2001-02

For the year 2001-02, the Health & Family Welfare Department, however, did not continue the grant of dual reservation benefits in favour of NT/DNT candidates for admissions to medical colleges, etc. while making the Rules for admission in the First MBBS/BDS/Physiotherapy at the Government Medical Collages, Government Dental Colleges, Government Schools of Physiotherapy and all self financed institutes of the State of Gujarat, 2001-02 published on 16.5.2001. On 30.5.2001, the Social Justice and Empowerment Department (Tribal Development Department) issued a Resolution extending dual reservation benefits in favour of the NT/DNT on the same lines as for the previous years. On 14.7.2001 when the

matter was taken up at the higher level, it was decided that the Medical Rules which published on 16.5.2001 would not be amended and dual reservation benefits ought not to be given to the NT/DNT with regard to the admissions in the First MBBS/BDS/B. Physiotherapy courses. The Health and Family Welfare Department sought the opinion of the Social Justice and Empowerment Department (Tribal Development Department) with regard to its decision not to grant dual reservation benefits to NT/DNT. The Social Justice and Empowerment Department (Tribal Development Department) concurred with the view expressed by the Health and Family Welfare Department and the file in the Social Justice and Empowerment Department (Tribal Development Department) was forwarded all the way up to the Hon'ble Minister and on 24.8.2001 the concurrence was given by the Social Justice and Empowerment Department (Tribal Development Department) to the view expressed by the Health and Family Welfare Department, and it was further noted that it was open to the Health and Family Welfare Department to decide whether to continue or discontinue the dual reservation benefits for the current academic year 2001-2002.

Soon after the above development, Special Civil Application No. 6876 of 2001 came to be filed by Vicharti and Vimukt Jati Mahasangh (Gujarat), present petitioner No. 1, for challenging Rule 2.5 on the ground that the same was contrary to the Government Resolution dated 30.5.2001. On 5.9.2001, a statement was made by the learned AGP, appearing on behalf of the State upon instruction from the Under Secretary of the Government in Health and Family Welfare Department and the Deputy Director, Technical Education that having taken a policy decision at the highest level, it is decided that for the present academic year dual reservation benefits shall continue in favour of NT/DNT. Accordingly, the following proviso came to be inserted in Rule 2.5 by way of an amendment issued by the State of Gujarat through its Health and Family Welfare Department Resolution dated 6.9.2001 (Annexure "D" to the reply affidavit) amending the Rules for admission to the First MBBS/BDS/B. Physiotherapy at the Government Medical/ Dental/Physiotherapy Colleges and all self financed institutes for these courses in the State of Gujarat for the academic year 2001-2002 :-

"Provided that as per Social Justice and Empowerment Department Govt. Resolution No. MIS/1098/CM/9/CH dated the 30th May 2001 and as per the Oral order from Hon'ble High Court of

Gujarat, the seats reserved for Scheduled Tribes (including Garudi) Candidate shall be filled up first from amongst the candidates of the Scheduled Tribes (including Garudi) Category only. The applications received from the candidate who have applied for admission to medical courses as SEBC candidates but who also belong to Nomadic Tribes/De-Notified Nomadic Tribes will be considered for such admission on the seats reserved for Scheduled Tribes candidates which may remain unfilled for the year 2001-2002 only."

4.6 2002-2003

The policy decision taken by the Health and Family Welfare Department on 5.9.2001 at the highest level was that for the academic year 2001-2002, the dual reservation benefits may continue; however, this was to be a one time measure for that year alone.

Accordingly, after the admission process concluded for the academic year 2001-02, the Health and Family Welfare Department addressed a communication dated 13.9.2001 informing the Tribal Welfare Department that though for the academic year 2001-02 the dual reservation benefits were continued, it was grossly unfair and against the public policy to grant such dual reservation benefits in favour of the NT/DNT candidates whereas other candidates belonging to the SC/ST/SEBC categories were granted benefits only in the category to which they belonged. There was no reply to the said communication. Prior to the finalization of the Admission Rules to the First MBBS/BDS/B. Physiotherapy at the Government Medical/Dental/Physiotherapy Colleges and all self financed institutes for the State of Gujarat for the year 2002-2003, a reminder dated 17.4.2002 was addressed to the Social Justice and Empowerment Department (Tribal Development Department) enclosing its earlier communication dated 13.9.2001 informing that for the academic year 2002-03 as stated earlier, dual reservation benefits would not be continued in favour of the NT/DNT candidates.

Thereafter on 18.5.2002, the State Government in the Health & Family Welfare Department issued a Government Resolution by order and in the name of the Governor of Gujarat, sanctioning and publishing the Rules for Admissions to the Medical, Dental and Physiotherapy courses in the Government Colleges and Self Financed Institutes in the State as an accompaniment to the said

resolution. Rule 2.5 did not contain any proviso for giving the members of the NT/DNT categories any dual reservation benefit in the form of a proviso which was inserted in the Admission Rules for the year 2001-2002 by Government Resolution dated 6.9.2001. However, thereafter the State Government in the Social Justice Department issued resolution dated 15.6.2002 continuing the benefit of dual reservation in favour of NT/DNT candidates in the matters of admissions to medical and engineering colleges on the same lines as per the resolutions passed for the previous years. The State Government in the Health Department considered whether the policy of dual reservation benefit in favour of NT/DNT as contained in the Resolution dated 15.6.2002 of the Social Justice Department should be applied for admissions to medical colleges or not. The Health & Family Welfare Department took the decision not to grant any dual reservation benefits in favour of NT/DNT categories as they are already receiving reservation benefits in the respective categories in which they are placed i.e. either as SC or ST or as SEBC category.

5. The petitioners filed the present petition on 19.8.2002 praying for the above referred to reliefs and also praying for mandatory orders for directing the State Government authorities in-charge of admissions to medical, dental and physiotherapy colleges to grant the petitioners and other candidates belonging to NTs/DNTs the benefit of dual reservation. The learned Single Judge (Coram: Hon'ble Mr Justice Jayant Patel) while issuing Rule on 4.9.2002 declined to grant the main interim relief as prayed for, but granted the alternative interim relief to consider the cases of the petitioners placed in SEBC category for the seats reserved for SEBCs. The said interim order was carried in appeal and the Letters Patent Bench (Coram : Hon'ble Mr Justice JN Bhatt and Hon'ble Mr Justice JR Vora) allowed the Letters Patent Appeal to the extent of granting interim relief during pendency of the petition not to fill in the unfilled seats of ST quota from out of open merit candidates and directed the petition to be taken up for early final hearing. Accordingly, the authorities in charge of admissions to Medical/Dental/Physiotherapy Courses have kept certain seats vacant. In view of the availability of 250 additional seats in self-financed medial colleges in the State, some reshuffling is to take place for which the process has already commenced on 9th December, 2002 and, therefore, at the request of the learned counsel for the parties, the petition has been taken up for final hearing.

6. Mrs KA Mehta, learned counsel for the petitioners has raised the following contentions :-

6.1 NT/DNTs earlier formed part of the Scheduled Tribes for the purpose of benefit of reservations for admissions to medical and engineering colleges. Therefore, the State Government has issued Government Resolution dated 15.6.2002 for conferring on the members of NT/DNTs reservation of seats which are unfilled by ST candidates. The said policy is in consonance with the provisions of Article 15(4) of the Constitution read with Article 46 of the Constitution and, therefore, the petitioner are entitled to have the same enforced. The admission rules approved vide Government Resolution dated 18.5.2002 are procedural rules which are not issued under Article 15(4)of the Constitution or under any statutory law but are mere executive instructions whereas the Government Resolution dated 15.6.2001 is issued under Article 15(4) of the Constitution and, therefore, the said circular is higher than the procedural rules published in the Government Resolution dated 18.5.2002.

6.2 Once the State Government has issued resolution dated 15.6.2002 prescribing that vacant seats of ST quota should be made available to the NT/DNT candidates, the authorities in charge of admissions to medical colleges have no other alternative but to follow the said resolution and the Health Department is bound by the said Government Resolution dated 15.6.2002.

6.3 Rule 2.5 of the Admission Rules has been the same from 1995 onwards and the same has already been interpreted by this Court in Shah Dimple vs. State of Gujarat, 1999(2) GLR 1491 wherein this Court has held that the words "are not available for the reserved seats for such community/category" clearly and unambiguously convey that the reserved seats for Scheduled Castes, Scheduled Tribes and SEBC have to be exhausted from amongst the reserved classes in the first instance and then only they would go to the unreserved categories of students.

6.4 In Dr KS Naik vs. Dr DN Shah, Dean Vadodara Medical Colleges, 2001(3) GLH 725, this Court has held that NT/DNT and SEBC are not mutually exclusive categories and, therefore, the Government is not justified in taking the view that NT/DNTs included in the SEBC category can not be given the benefit of unfilled seats from the quota reserved for Scheduled Tribes.

6.5 As per the Gujarat Government Rules of Business,

1990 and the instructions issued thereunder, it is the Social Welfare and Tribal Development Department (now known as Social Justice and Empowerment Department) which is entrusted with the administrative machinery for backward classes, social welfare and tribal welfare.

6.6 Strong reliance is placed on the decisions in 1990(2) GLR 808, 1999(2) GLR 1491, 2001 (3) GLH 725, 1996(4) SCC 1378, AIR 1987 SC 331 and AIR 1993 SC 477.

7. On the other hand, Ms Manisha Lavkumar, learned Assistant Government Pleader has made the following submissions :-

7.1 It was as far back as in 1976 that Justice Bakshi Commission (Socially and Educationally Backward Class Commission) itself had recommended that NTs/DNTs are to form part of Socially and Educationally Backward class. The Admission Rules sanctioned and published by Government Resolution dated 18.5.2002 provide for reservation for Scheduled Castes (7%), Scheduled Tribes (15%) and Socially and Educationally Backward Classes (27%). There is no separate reservation for NTs/DNTs because NTs/DNTs are already included in one or the other of the three reserved categories. Out of 40 tribes which were earlier notified in the year 1963 as NTs/DNTs, 2 are included in Scheduled Castes, 6 are included in Scheduled Tribes and 32 are included in Socially & Educationally Backward Classes (SEBC). In view of this position, by Government Resolution dated 16.6.1995, the State Government had already decided not to grant dual reservation benefits in favour of the NTs/DNTs as they are already getting the benefits of reservation in their respective reserved categories where they are placed. Subsequently Government resolution dated 16.7.1995 was required to be issued in order to take care of the transition period as the admission process for the year 1995-96 had already commenced and, therefore, unfilled seats of ST quota were made available to NT/DNT candidates as a temporary measure. Subsequently, such temporary treatment was extended on year to year basis as the decision to grant such extension was usually taken in summer every year by which time the admission process was to commence upon declaration of the results of the Higher Secondary (Science Stream) Examination. However, the Sate Government in the Health Department had taken a clear stand for the year 2001-02 not to grant such dual reservation benefits in favour of NTs/DNTs while publishing the Admission Rules for Medical Colleges for the year 2001-02 vide Government Resolution dated 16.5.2001. However, thereafter on 30.5.2001, the Social

Justice & Empowerment Department issued a resolution extending dual reservation benefits in favour of NT/DNT. On 14.7.2001, the matter was considered at the highest level in the Government and it was decided that the medical rules would not be amended and dual reservation benefits would not be given to NT/DNT with regard to admissions in medical/dental/physiotherapy courses and this was conveyed by the Health & Family Welfare Department to the Social Justice & Empowerment Department. Even the Social Justice & Empowerment Department right upto the Hon'ble Minister in charge of the department concurred with the view of the Health & Family Welfare Department and it opined that it was open to the Health and Family Welfare Department to decide whether to continue or discontinue the dual reservation benefits for the year 2001-02. However, when that decision was challenged before this Hon'ble Court, the State Government in the Health & Family Welfare Department at the highest level decided to grant a concession as a one time measure for the year 2001-02 and, therefore, Rule 2.5 was amended by insertion of the proviso as per the Government Resolution dated 6.9.2001. For the year 2002-03, the State Government in the Health Department has taken a conscious decision not to adopt the policy of the Social Justice Department.

7.2 As per the Gujarat Government Rules of Business, 1990, the subject of "medical education" is allotted to the Health and Family Welfare Department. From 1999-2000 onwards whenever the Health and Family Welfare Department ultimately accepted the policy of the Social Justice and Empowerment Department to grant dual reservation benefits in favour of NTs/DNTs for admissions to medical colleges, a proviso was added to Rule 2.5 in the Admission Rules expressly providing that unfilled seats of ST quoted will be made available to NT/DNTs. After issuing the Government Resolution (Health Department) dated 6.9.2001 adding such proviso to Rule 2.5 for the year 2001-02, the Health and Family Welfare Department had taken up the matter with the Social Justice Department making it clear that for admissions to medical/dental/physiotherapy courses for the year 2002-03 onwards, there will be no dual benefits in favour of NT/DNTs as is clearly stated in the affidavit in reply filed on 26.11.2002. It is a policy matter for the Health and Family Welfare Department to decide.

Reliance is placed on the decisions in 20 GLR 614, AIR 1999 SC 2894, 1969 (2) SCC 228, 1971 SCC 607 and AIR 1968 SC 1379.

7.3 Even in absence of any statutory provision in the field, it is open to the State Government in exercise of its constitutional powers under Articles 162 and 166 of the Constitution read with Entry 25 in the Concurrent List in the Seventh Schedule to the Constitution to frame rules for admissions to institutes of medical education. Under the Gujarat Government Rules of Business, 1990 framed in exercise of powers under Article 166(3) of the Constitution, the subject "medical education" is allotted to the Health & Family Welfare Department. The subject would include granting admissions to medical colleges which in turn would also include the power to prescribe qualifying marks for different categories of candidates and also the power to prescribe the percentage of reservation and the power to provide the extent of reservation. The Admission Rules approved by the State Government in the Health & Family Welfare Department and published in the Government resolution dated 18.5.2002 by order and in the name of the Governor of Gujarat do not automatically stand altered by the Government resolution dated 15.6.2002 issued by the Social Justice Department of the State Government.

7.4 Since the petitioners joined the Secretary to the Social Justice and Empowerment Department only after the final hearing commenced, notice was issued to the said respondent returnable on 4.12.2002. The learned AGP has placed on record the letter dated 7.12.2002 from the Social Justice and Empowerment Department informing the learned Government Pleader that the present caretaker Government will not be in a position to take any policy decision as to which Government resolution would prevail in the matter of grant of dual reservation benefits in favour of NT/DNT whether the Government resolution dated 18.5.2002 or Government resolution dated 15.6.2002 issued by the two different departments and that it will be atleast one more month before any final policy decision can be taken in the matter.

8. However, considering the fact that the first round of admissions to medical colleges was over in September, 2002 and the second round or reshuffling on account of availability of 250 seats in self financing medical colleges has already commenced from 9.12.2002, the matter has been heard finally and is being disposed of by this judgment so as not to allow any uncertainty to continue and so as to ensure that vacant seats of ST quota are not wasted.

9. Having heard the learned counsel for the parties and having given anxious and thoughtful consideration to

the issues raised before the Court, this Court is of the view that the petition deserves to be dismissed for the reasons that follow.

10. In the first place, there cannot be two opinions on the proposition canvassed by the learned AGP that Article 15(4) is an enabling provision and that in a petition under Article 226 of the Constitution, this Court cannot direct the Government to formulate a particular policy about the extent to which reservation should be given to the members of the Scheduled Castes, Scheduled Tribes or other backward classes. However, the trump card of the petitioners is Government Resolution dated 15-6-2002 which conveys that if seats in medical colleges reserved for Scheduled Tribes remain vacant for want of adequate number of eligible Scheduled Tribe candidates, such vacant seats shall be made available to NT/DNT candidates. The said Government Resolution dated 15-6-2002 issued by the State Government in the Social Justice Empowerment Department seems to be on the same pattern as the Government Resolutions for the previous years issued by the State Government in the same department following the first such resolution dated 14-7-1995 all of which seem to be putting the policy contained in the Government Resolution dated 16-6-1995 on hold.

11. The impediment in the way of the petitioners is that the State Government in the Health & Family Welfare Department which is entrusted with the powers and duties of regulating medical education which would obviously include admissions to medical colleges has not accepted for the year 2002-03 policy of granting dual reservation benefits in favour of NT/DNTs on the ground that NT/DNTs are already included in one or the other of the three reserved categories i.e. SC,ST or SEBCs. Under the Gujarat Government Rules of Business 1990, the subjects allotted to the Social Welfare and Tribal Development Department (now called Social Justice and Empowerment Department) do not include any subject relating to admissions to educational institutions much less admissions to medical colleges. Item No.1 in the list of subjects allotted to the said Department reads as under:-

"Administrative machinery for backward class for social welfare and tribal welfare"

The petitioners have not been able to point out any particular subject or entry in the list of subjects allotted to the Social Welfare and Tribal Development Department (Social Justice Department) to which the

matter of admissions to medical colleges can be related. It is true that the State Government in the same Department has also issued the same Government Resolution for admissions to engineering colleges also and the said resolution dated 15-6-2002 appears to be followed for admissions to engineering colleges. However, engineering colleges are run by the Directorate of Technical Education under the Education Department and if Education Department has adopted such policy of giving dual reservation benefits to NT/DNTs, this is again a matter of policy. However, the controversy in the instant case is about admissions to medical/dental and physiotherapy colleges of the State Government governed by the aforesaid Admission Rules which are being framed and published by the State Government in the Health and Family Welfare Department every year before the commencement of the admission process.

12. The thrust of the submission of the learned AGP is that from 1999-2000 onwards every year the Health Department has been considering whether it should follow or not follow the policy of granting dual reservation benefits to NT/DNT candidates advocated by the Social Justice Department. The State Government in the Health Department had made specific provision in the admission rules for the years 1999-2000 to 2001-02 by including or adding a proviso to Rule 2.5, but that was meant to be a temporary measure and the Health Department is not bound to adopt that policy for all time to come.

13. Mrs Mehta for the petitioners has vehemently submitted that the policy of the State Government is to be read from the Government Resolution and not from any notings on the file. In support of the said submission, strong reliance has been placed on the decision of the Apex Court in State of Kerala vs. A Lakshmikutty, AIR 1987 SC 331 and particularly the following observations made in para 40 of the said judgment:-

> "The Governor has to act with the aid and advice of the Council of Ministers as required by Art. 163(1). Whatever the Council of Ministers may say in regard to a particular matter, does not become the action of the State Government till the advice of the Council of Ministers is accepted or deemed to be accepted by the Head of the State. Before an advice of the Council of Ministers amounts to an order of the State Government, there are two requirements to be fulfilled, namely, (1) the order of the State

> Government had to be expressed in the name of the Governor as required by Art. 166(1), and (2) it has to be communicated to the persons concerned. ... ... It must therefore follow that unless and until the decision taken by the Council of Ministers on January 30, 1985 was translated into action by the issue of a notification expressed in the name of the Governor as required by Art. 166(1), it could not be said to be an order of the State Government. Until then, the earlier decision of the Council of Ministers was only a tentative one."

14. The difficulty in the petitioners' way, however, is that there are two Government Resolutions -

(i) Government Resolution dated 18-5-2002 of the State Government issued by the Health and Family Welfare Department approving the Rules for Admissions to Government medical, dental and physiotherapy colleges and to the self-financing institutions running the said courses on the one hand, and

(ii) the Government Resolution dated 15-6-2002 issued by the State Government in the Social Justice Department providing that if the seats reserved for Scheduled Tribes remain vacant, such seats reserved for Scheduled Tribes shall be made available to the candidates belonging to NTs/DNTs.

The aforesaid decision of the Apex Court in State of Kerala vs. A Lakshmikutty (Supra), therefore, cannot help in resolving the controversy raised in the present petition as both the Resolutions are issued by the State Government by and in the name of the Governor of Gujarat. As already indicated above, the matter would, therefore, have to be decided on the basis of the Gujarat Government Rules of Business, 1990 framed under Article 166(3) of the Constitution and as per the said rules, the subject "medical education" is allotted to the Health and Family Welfare Department. The subjects allotted to the Social Welfare and Tribal Development Department (now Social Justice Department) do not include any subject pertaining to reservations for admissions to educational institutions, much less to medical colleges. Hence in the matters of admissions to 1st MBBS/1st BDS/1st Year Physiotherapy Courses in the Government Colleges and in

self financing Institutes in the State of Gujarat, it is the Rules contained in the Government Resolution dated 18.5.2002 which will prevail.

15. The petitioners' contention that the Government Resolution dated 15.6.2002 stands on a higher footing than the Admission Rules cannot be accepted. Article 15(4) is an enabling provision. There is no statutory provision occupying the field. Medical Education (the subject allotted to the Health and Family Welfare Department under the Gujarat Government Rules of Business, 1990) is covered by Entry 25 in the List III [Concurrent List in the Seventy Schedule to the Constitution] which reads as under :-

"25. Education, including technical education, medical education and universities, subject to the provisions of Entries 63, 64, 65 and 66 of List I; vocational and technical training of labour."

Interpreting the said entry, the Apex Court has held in Ajay Kumar Singh vs. State of Bihar, (1994) 4 SCC 401 (paras 22 to 24) that regulation of admissions to medical courses is integral to the power contained in Entry 25 List III. The power of the State, which has established and is maintaining these institutions out of public funds must be held to possess the power to regulate the admission policy consistent with Article 14 and would, therefore, include the power to provide for reservations under Article 15(4) as well.

Reservation for Scheduled Castes, Scheduled Tribes and Socially and Educationally Backward Classes may be provided for by executive orders. The provisions of rule 2 of the Admission Rules under the Government Resolution dated 18.5.2002 providing for reservations for SC/ST/SEBC can only be traced to Article 15(4) albeit read with Articles 162 and 166 of the Constitution. Hence, the question of considering the Admission Rules as on a lower footing cannot be arise.

15A. Assuming that the question of reservations in favour of backward classes for admission to medical/dental/physiotherapy courses concerns both the Health and Family Welfare Department and the Social Justice Department, reference will have to be made to the Gujarat Government Rules of Business, 1990 and the instructions dated 21-3-1990 issued by the Governor of Gujarat under Rule 15 of the Gujarat Government Rules of Business, 1990. Rule 3 (i) of the said Rules provides

that a case shall be deemed to belong to a department to which under the Schedule to the Rules, the subject matter thereof pertains or is mainly related. Medical Education is a subject allotted to Health & Family Welfare Department.

Instructions 9 and 10 read as under:-

"9. When the subject of a case concerns more than one Department, no order shall be issued nor shall the case be laid before the Council or the Cabinet until it has been considered by all the Departments concerned unless the case is one of extreme urgency".

"10. If the Departments concerned are not in agreement regarding a case dealt with under instruction 9, the Minister-in-charge of the Department may, if he wishes to proceed with case, direct that the case be submitted to the Chief Minister for orders for laying the case before the Council or the Cabinet."

16. It is the specific case of the Health Department in the instant case that the Health Department which is allotted the subject of medical education had insisted for the year 2002-03 that NTs/DNTs are not to be given dual reservation benefits and it is not the case of the Social Justice Department that Social Justice Department had consulted the Health and Family Welfare Department before issuing the Government Resolution dated 15-6-2002 or that the said Resolution was issued pursuant to any decision of the Cabinet or the Council of Ministers. The Court is conscious of the provision contained in Article 163(3) of the Constitution that the question whether if any or if so, what advice was tendered by the Council of Ministers to the Governor shall not be enquired into in any Court. The cases of the respective departments are however considered by the Court only in view of the fact that there are two Government Resolutions both issued by order and in the name of the Governor of Gujarat and, therefore, the Court is required to ascertain as to which resolution will apply in the matter of admissions to medical colleges. When the Court finds that as per the Gujarat Government Rules of Business, 1990 framed under Article 166(3) of the Constitution, the subject of medical education is allotted to the Health and Family Welfare Department, it is obvious that the petitioners' prayer to direct the Health and Family Welfare Department to follow the Government Resolution dated 15-6-2002 issued by the State Government in the Social Justice

Department and to prepare a separate list for NT/DNT candidates contrary to Rule 2.4 of the Admission Rules as approved by the Government Resolution dated 18-5-2002 issued by the State Government in the Health and Family Welfare Department cannot be granted.

17. Mrs Mehta, however, has vehemently submitted that even in absence of any proviso to Rule 2.5 as was added in the admission rules for the years 1999-2000 to 2001-02, Rule 2.5 by itself provides that the seats reserved for the three categories must be first made available for the reserved category candidates and thereafter if any more seats remain unfilled then only they can be made available to open category candidates. Strong reliance has been placed in this behalf on the following observations made by a learned Single Judge of this Court in Shah Dimple vs. State of Gujarat, 1999 (2) GLR 1491 (1506):-

> "In my opinion, the usage of the words "are not available for the reserved seats for such community/category" clearly and unambiguously convey that the reserved seats for Scheduled Castes, Scheduled Tribes and S.E.B.C. have to be exhausted from amongst the reserved classes in the first instance and then only they would go to the unreserved category of students."

18. Having carefully considered the aforesaid decision of a learned Single Judge of this Court (Coram: Hon'ble Mr Justice MS Parikh), this Court is not satisfied that the said decision can clinch the matter in favour of the petitioners.

18.1 In the first place, in the case of Shah Dimple vs. State (Supra), the learned Single Judge did not rest his decision merely on the language of Rule 2.5 and clearly indicated in para 15 of the judgment that Rule 2 was required to be read in light of the Government Resolutions ending with the Resolution dated 3.6.1998. In that case, the State Government had spoken in one voice, since for the year 1998-99 (with which that Court was concerned in that case) the Health and Family Welfare Department appears to have adopted or atleast acquiesced in the policy contained in the Government Resolution dated 3.6.1998 referred to in para 14 of the judgment.

18.2 Secondly, even assuming that the observations were to mean what the petitioners interpret them to mean, seats reserved for ST candidates, but not filled in by ST

candidates, would be available not only to SEBCs, but also to Scheduled Castes - admittedly by one of the reserved categories. There is nothing in the Rules for working out as to how such vacant ST seats are to be distributed amongst Scheduled Castes and Socially and Educationally Backward Classes. If backwardness is to be taken as the criterion for deciding inter se priority amongst these reserved categories, Scheduled Castes have always been considered to be more backward than the Socially and Educationally Backward Classes, and, therefore, also 32 NT/DNTs placed in the list of SEBCs will not be in a position to claim priority or preference qua the seats reserved for STs and lying vacant. This is a clear pointer that Rule 2.5 by itself without adoption by the Health Department of the policy for grant of dual reservation benefits in favour of NT/DNTs for the year 2002-03 does not support the petitioners' case.

18.3 Moreover, this Court has reservations on the above quoted observations in para 18 of the decision in Shah Dimple (Supra) because the said decision does not consider all the words in Rule 2.5, particularly underlined in the Rule as quoted hereinafter:-

> "In case it is found in any particular year that the number of seats belonging to respective communities and or categories mentioned above are not available for the reserved seats for such communities/categories the vacant seats from the reservation shall be treated as unreserved seats and filled up from amongst the students from the open merit list for the purposes of these admissions ..... "

Rule 2.5 thus makes it clear that in case it is found in any particular year that the number of students belonging to Scheduled Tribes are not available for the seats reserved for Scheduled Tribes, the vacant seats from that reservation shall be treated as unreserved seats and filled up from amongst the students from the open merit list. The later part of Rule 2.5 quoted in paragraph 17 of the said judgment cannot be interpreted in isolation without reference to the words "respective communities" in the first part of Rule 2.5. For the view that this Court is inclined to take, it might have ordinarily been required to refer the matter to a Larger Bench, but it is not necessary to do so because this Court has already held earlier that medical education is

a subject allotted to the Health and Family Welfare Department and not to the Social Justice Department and, therefore, in the matter of admissions to medical colleges, the Admission Rules sanctioned by the State Government in the Health and Family Welfare Department and contained in the Government Resolution dated 18.5.2002 without adoption by the Health Department of the policy of granting dual reservation benefits in favour of NTs/DNTs for the year 2002-03 (as contained in the resolution dated 15.6.2002 issued by the State Government in the Social Justice Department) must be read independently as they stand by themselves. In short, in the case of Shah Dimple (Supra), this Court was not required to examine the controversy raised in this petition.

19. The intention of the rule making authority is also apparent from the perusal of the rules for the year 1999-2000, 2000-01 and 2001-02 that whenever the State Government in the Health Department had intended to grant dual reservation benefits in favour of candidates belonging to NTs/DNTs, a specific proviso was added to Rule 2.5 and, therefore, absence of such proviso in the years prior to 1999-2000 cannot tilt the matter in favour of the petitioners merely because the Health and Family Welfare Department had acquiesced in the policy as contained in the Government Resolutions issued by the Social Justice Department earlier. The policy then adopted by the State Government in the Health Department for the earlier years cannot bind the State Government in the Health Department for adopting the same policy for subsequent years in the matter of admissions to medical, dental and physiotherapy colleges qua the issue of continuance or otherwise of the dual reservation benefits in favour of NTs/DNTs.

20. As already indicated above, the State Government through its instructions dated 7-12-2002 addressed to the Government Pleader has acknowledged that there is a discord between the policy of the State Government in the Health and Family Welfare Department as contained in the Admission Rules dated 18-5-2002 and in the policy of granting dual reservation benefits in favour of NTs/DNTs as contained in the Government Resolution dated 15-6-2002 issued by the State Government in the Social Justice Department. As already discussed earlier, the subject of medical education is allotted to the Health and Family Welfare Department and, therefore, in exercise of its extraordinary jurisdiction under Article 226 of the Constitution, this Court would not issue a writ to the State Government in the Health and Family Welfare

Department to adopt a particular policy in the matter of reservations under Article 15(4) which the State Government in the Health and Family Welfare Department has not adopted.

21. For the reasons aforesaid, the petition is dismissed.

Rule is discharged with no order as to costs.

Interim relief granted earlier stands vacated.

In case the petitioners are eligible to be considered for admission to First MBBS/Dental/ Physiotherapy courses on the strength of their belonging to the Socially and Educationally Backward Classes, the respondent-authorities shall consider their case for the seats reserved for SEBC as per the statement which was already made earlier.

(M.S. Shah, J.)
sundar/zgs

At this stage, Mrs Mehta learned counsel for the petitioners requests that the interim relief which has operated during pendency of the petition may be continued for some time to enable the petitioners to have further recourse in accordance with law.

In view of the fact that during pendency of the petition, seats reserved for the Scheduled Tribe candidates but lying vacant (on account of non-availability of adequate number of Scheduled Tribe candidates) were required to be kept vacant at the time of the first round of admissions of the medical/dental/ physiotherapy courses in September, 2002. The learned AGP states that certain seats have remained vacant on account of the operation of the interim relief. The second round of admissions has recently commenced on 9th December, 2002 and, therefore, continuing the interim relief would require the institutions to keep a number of seats in Medical/Dental/Physiotherapy courses vacant which will neither be in the interest of the students nor in the interest of the institutions. Moreover, continuing the interim relief will not only continue uncertainty but it will also create difficulties for the students who may be admitted later on as regards the minimum requisite attendance in attending the classes.

The request for continuance of interim relief is, therefore, not accepted.

(M.S. Shah, J.)

sundar/-